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No. 89-369

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

ROBIN S. CONRAD
Counsel of Record
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae Chamber of Commerce of the United States of America

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STATEMENT OF INTEREST

On behalf of its member companies, the Chamber of Commerce of the United States ("the Chamber") submits this brief *amicus curiae* in support of General Motors Corporation's petition for a writ of *certiorari* in the above case.[1] The Chamber is the largest federation of business organizations and individuals in the United States. Its membership includes over 180,000 corporations, partner-

[1] This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 36.1. Letters of consent are on file with the Clerk of the Court.

ships and proprietorships, as well as several thousand trade and professional associations, and state and local chambers of commerce. The Chamber regularly represents the interests of its membership—which reflects the diversity of American industry and includes companies of all sizes and types—before this Court on important environmental issues of national concern to business.[2]

The question before the Court in this case is whether the United States may bring an enforcement action seeking compliance with an outdated state Clean Air Act implementation plan where EPA has failed to act to approve or disapprove a revised state plan within four months as required by the Act. This case raises fundamental issues concerning the proper roles of the federal government and the states in the establishing and implementing State Implementation Plans ("SIP") under the Clean Air Act. The issues presented go to the heart of the ability of states to make ongoing policy choices as to air pollution control measures, and raises legal and practical questions of vital interest to the Chamber and its members.

The Chamber is committed to the goals of the Clean Air Act and compliance with its requirements. The Chamber does not believe, however, that Congress intended to allow EPA to blatantly ignore the primary responsibility of the states to assure the attainment of air quality goals. The Chamber is concerned that the First Circuit's decision is contrary to the intent of Congress and creates disincentives for the fair administration of the Act.

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[2] *See e.g.*, Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987); Tull v. United States, 481 U.S. 412 (1987); Dow Chemical Company v. United States, 476 U.S. 227 (1986); Chemical Manufacturers Association v. Natural Resources Defense Council, 470 U.S. 116 (1985).

STATEMENT OF THE CASE

A. The Central Role Of The States In Implementing The Act.

The Clean Air Act, as adopted in 1970 and revised in 1977, creates an important federal-state partnership. In the 1970 Act, Congress increased federal authority and responsibility for achieving air quality goals. The states were required to attain federally specified air quality standards within particular periods of time. The statute expressly preserves an important principle, however:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ." 42 U.S.C. § 7407(a).

A central mechanism to implement the Clean Air Act involves the formulation by each state of a plan for the implementation, maintenance, and enforcement of the national air quality standards within each region in the state.[3] Implementation plans are adopted by the states and submitted to EPA for review, and within four months EPA must either approve or disapprove all or part of the plan.[4] A plan validly adopted by a state and approved by EPA is enforceable by both the federal government and the state.

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[3] A state's implementation plan ("SIP") must include emission limitations, schedules for compliance, and such other measures as may be necessary to ensure attainment and maintenance of the national standards. 42 U.S.C. § 7410(a)(2).

[4] 42 U.S.C. § 7410(a)(2), (3). If a state fails to submit a plan within the time prescribed, or submits a plan that the Administrator determines not to comply with the requirements of the Act, the Administrator shall promulgate a plan for that state. 42 U.S.C. § 7410(c). Such an EPA promulgation is subject to notice and comment requirements as well as judicial review, 42 U.S.C. §§ 7607(b) and (d).

It is important to underscore that the Clean Air Act gives EPA no authority to question the wisdom of a state's choices of emission limitations if the plan otherwise satisfies the requirements of the Act. Thus, a state is free to alter or fine tune its air quality program as often as needed to accommodate changing economic, technological or air quality conditions.[5] As this Court emphasized in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79 (1975), "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."

B. The Decision Below.

The Commonwealth of Massachusetts adopted regulations requiring the painting operations at General Motors' automobile plant in Framingham to meet certain air emission limits for volatile organic compounds ("VOCs") by December 31, 1985. In October 1981, the U.S. Environmental Protection Agency (EPA) published a policy statement supporting deferral of certain Clean Air Act compliance dates for automobile painting to encourage development of more cost-effective and environmentally beneficial processes. 46 Fed. Reg. 51386 (1981). Pursuant to this policy, the Commonwealth extended the applicable deadline for automobile painting operations to August 31, 1987, and submitted the revised regulations for EPA approval in December 1985.

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[5] States often revise their implementation plans in efforts to resolve source-specific compliance issues, especially where the enforcement of an existing SIP may be highly disruptive to the local economy or inappropriate to changed circumstances. These revisions frequently contain innovative pollution control measures, including the use of more cost-effective alternative technologies and emission trading policies. They also may provide ways to bring companies into compliance without shutting them down immediately. *See* American Cyanamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987).

The purpose of the extension was to allow General Motors to continue operating the old paint facility until it could construct a $200 million new facility which, in keeping with the deferral policy, uses advanced technology and lower VOC content paint. In compliance with the revised state regulations, General Motors permanently shut down the old paint facility in July 1987, a full month ahead of schedule.

Rather than promptly reviewing the revised SIP within the four-month period required by law,[6] EPA chose to bring an enforcement action seeking penalties and injunctive relief for General Motors' alleged noncompliance with the 1985 deadline in the original regulations. Citing *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), the District Court granted summary judgment to General Motors, and held that EPA's failure to take final action on the revised regulations in a timely manner bars EPA from obtaining the relief requested.

In *American Cyanamid*, the Fifth Circuit invalidated a nearly identical enforcement action. There, the court held that EPA may not commence an enforcement action seeking penalties for alleged violations of outdated state regulations where EPA had failed to take final action on revised state regulations within four months. The court reasoned that EPA's disregard of "the important role which the state plays in defining authorized emissions" bars EPA from collecting a penalty in such circumstances. 810 F.2d at 500. The court found such a bar to be necessary in order (1) to give effect to the states' prerogatives under the Act to decide what emission limits are appropriate, and (2) to avoid the bias that would inevitably be

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[6] *See* n.4 above. EPA in fact did not take final action until the day it filed its brief in the First Circuit. EPA took the position that the 4-month rule did not apply to SIP revisions, a position rejected by the First Circuit as well as the majority of courts which have considered the issue. *See* Slip Op., General Motors petition, Appx. 9a-12a.

introduced into EPA's SIP review process should the Agency be permitted to bring enforcement actions before deciding whether to approve a SIP revision which would moot the enforcement issues.

In this case, however, the First Circuit reversed the district court and held that EPA may bring an enforcement action against General Motors despite the Agency's failure to act on a SIP within four months as required by statute. The court acknowledged that "Congress clearly was concerned with preserving the states' ability to tailor SIPs to local needs and conditions" and that Congress did not intend "the states' legitimate policy choices to be held hostage to the EPA's schedule."[7] The court below expressly disagreed with the Fifth Circuit's approach in the *American Cyanamid* case, however. The court speculated that EPA will frequently fail to act within four months without citing any factual support for this proposition, and concluded that the *American Cyanamid* enforcement bar was "too drastic" a remedy.[8] Instead, the First Circuit ruled that the enforcement action could be brought, and that General Motors' only remedy for EPA's delay is to urge the trial court to exercise its discretion to reduce the amount of the penalties based on the reasonableness of EPA's delay and the prejudice suffered by the company as a result.[9]

The decision below leaves EPA free to ignore state SIP revisions and to enforce original SIP provisions which no longer reflect state policy choices as to how best to achieve air quality goals. The decision creates no incentives for EPA to act in a timely manner, and will frustrate the ability of states and companies to adopt and implement SIP provisions reflecting changing needs and conditions.

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[7] Slip Op., General Motors petition, Appx. 11a-12a.

[8] *Id.* at 14a.

[9] *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

I. Supreme Court Review Will Resolve This Conflict In The Circuits And Provide Certainty To Companies Regulated Under The Clean Air Act.

The issue presented in this case is whether EPA may bring a suit to enforce existing state implementation plan (SIP) regulations when the state has revised its plan and EPA has taken no action to review the plan for almost two years, well outside the four-month period in the statute. The correct reading of the Clean Air Act, adopted by the district court in this case[10] and the Fifth Circuit in the *American Cyanamid* decision is that EPA may not prosecute a suit for penalties under such circumstances.

The Fifth Circuit addressed the proper remedy for EPA's violation of the four-month rule in detail in *American Cyanamid*. In that case, EPA failed to take action on a SIP revision submitted by the State of Louisiana concerning the manner in which a company could demonstrate compliance with certain emission limitations. Instead, EPA filed an enforcement action more than four months after the SIP revision was proposed for noncompliance with the old SIP requirements.

Stressing the importance of avoiding a situation in which "EPA loses nothing by its contumaciousness," 810 F.2d at 499, and emphasizing the need to give EPA an incentive to respect the four-month rule, the Fifth Circuit held that "EPA may not collect a penalty for the period between (1) four months after a state submits a proposed revision, and (2) the date the EPA finally rejects that revision."[11] 810 F.2d at 500. Since the Notice

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[10] General Motors petition, Suppl. Appx.

[11] The court pointed out that if the SIP revision were ultimately rejected, "American Cyanamid will not benefit 'undeservedly,'"

of Violation had not been issued until some time after the four-month deadline for action on the revision (as in this case), the court held that EPA could not bring an enforcement action against American Cyanamid for any violation of the old SIP that occurred before EPA completed its review of the revision—whether or not EPA ultimately rejected the revision.[12]

The court in *American Cyanamid* also pointed out that EPA's practice of bringing enforcement actions before acting on SIP revisions "may encourage the EPA to reject [SIP] revisions that it should accept." *Id.* at 499. After EPA brings such an enforcement action, it is difficult to see how EPA could act in a disinterested way to approve a SIP revision and thereby rule that the company involved is not subject to enforcement after all. As the Fifth Circuit held, such a situation contains a built in conflict which threatens to undermine "EPA's even-handed administration of the Act." *Id.*

The equitable and policy implications of the First Circuit's decision should also be noted. There was no significant detriment to the environment involved in this situation—indeed, the long-term emissions from the Framingham plant were actually reduced through the con-

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since the state had undertaken to authorize its method of compliance and "[i]f the EPA collects less than it could collect retroactively . . . it is because of its own failure to act within the time limits set by the Act." *Id.* at 501.

[12] The Fifth Circuit also rejected the position adopted by the First Circuit in this case (General Motors petition, Appx. 14a) that a remedy for addressing EPA's failure to complete its review in four months is a suit in the district court to require EPA to act:

> "The EPA must review a revision within four months whether or not the state or some other party sues to hasten its decision. A suit to force the agency to act is one remedy, but should not be the only remedy for delay, once the interests of the states themselves are recognized." (810 F.2d at 501 n.11).

struction of a new paint facility that has lower emissions than the old one would have had even with planned controls.[13] That the emissions authorized in the short term under the SIP revision did not present a serious environmental problem is demonstrated by EPA's own actions: although the deadline the Agency seeks to enforce lapsed in December 1985, the Agency did not even bring this enforcement action until August 1987, after the old paint facility was already closed.[14] This fact defeats any suggestion that precluding enforcement is for some reason "inequitable" in this case.

Moreover—and of greater importance—if EPA believed that the old paint facility presented an environmental threat, the Agency could have made enforcement action possible at any time simply by acting on the SIP revision. In this sense, as the district court pointed out, EPA always held "the ultimate trump card." (General Motors Suppl. Appx. at SA-6). The only thing that ever stood in the Agency's way was its own deliberate decision to ignore the four-month rule and the SIP revision and to proceed instead with enforcement. At the same time, by failing to act on the SIP revision, EPA deprived the state of its own right to explore regulatory alternatives and to adopt a form of its SIP that could meet national standards in a manner the state deemed to be most consistent with its interests and with the interest of its citizens. Such a result, if permitted to continue, would

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[13] It was, presumably, this consideration that led the Commonwealth to promulgate the SIP revision in the first place. *See* p. 4, *supra*.

[14] If EPA is as concerned as it claims to be about limited resources and the appropriate ordering of priorities, it is difficult to understand why EPA cannot allocate the resources to review SIP revisions in a timely manner but can find the resources that bring enforcement actions against permanently closed facilities that may never have been out of compliance at all.

be both inequitable and directly contrary to the policy of the Clean Air Act.[15]

II. Supreme Court Review Will Answer Important Recurring Questions Concerning State Plans Under The Clean Air Act.

In construing the Clean Air Act, federal and state judicial review and enforcement cannot be regarded as independent and unrelated instruments of justice. The First Circuit's decision fails to appreciate the fundamental need to assure that the objectives of the Clean Air Act will be attained through coordinated federal and state actions, and in a manner consistent with the primary role of the states.

It must be emphasized that SIPs implementing the Clean Air Act are not static. State agencies must revise their program periodically to accommodate a variety of circumstances, including new air quality data, changing economic and technological conditions, and revised state policies and programs. State SIP revisions, such as the revision involving General Motors in Massachusetts, can address specific air control issues in an innovative way resulting in increased air pollution control.

Congress anticipated that the states would be revising their SIPs periodically. Section 110(a)(3) of the Act

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[15] As emphasized in the American Cyanamid decision:

> "It distorts the statutory scheme to place virtually full emphasis upon the business entity involved as a charged 'polluter.' The emphasis of the statute, rather, is upon the important role which the state plays in defining authorized emissions. . . . The issue then is not so much pollution by American Cyanamid but the default of the EPA in carrying out the congressional intent to work in close cooperation with the states in implementing standards and enforcing the Clean Air Act." *Id.* at 500.

Delay on the part of EPA should not hamper the state's right and duty to regulate and protect its own citizens as it sees fit.

allows the states to adopt plan revisions, and provides that EPA may review such revisions on the same basis as the initial state plans. 42 U.S.C. § 7410(a)(3). This Court specifically underscored the importance of the section 110(a)(3) authority of states to revise SIPs to effectuate their ongoing policy choices:

> "[T]he revision section is to all appearances the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards." (*Train* v. *NRDC*, *supra*, 421 U.S. at 80).

Under EPA's theory, the government can simply ignore a state's policy choices and statutory authority to select whatever mix of emission limits will achieve the national standards. The EPA believes that it can ignore a SIP revision indefinitely, if it chooses to, and bring a suit to enforce the original state plan. Instead of deferring to states' choices of control strategies, the Agency exercises the equivalent of a "pocket veto" over state implementation decisions, a result clearly not contemplated by the statute. *See, Bethlehem Steel Corp.* v. *EPA*, 782 F.2d 645, 650 (7th Cir. 1969).[16]

Conflicting federal and state requirements will necessarily result from prolonged EPA inaction. State plan

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[16] Courts have previously rejected similar exercises of unilateral federal regulations through failure to take timely action. *See, e.g.*, Indiana & Michigan Electric Co. v. EPA, 733 F.2d 489, 492 (7th Cir. 1984) (EPA may not delay action on a key provision of a plan if such delay has the effect of disapproving an integral part of the plan without determining that the part violates the requirements of the Act); Bethlehem Steel Corp. v. Gorsuch, 724 F.2d 1028, 1036 (7th Cir. 1984) (while EPA may approve a regulation in part and disapprove it in part, it may not, under the guise of partial approval, change the substance of the regulation); Alabama Power Co. v. Costle, 636 F.2d 323, 364 (D.C. Cir. 1979) (EPA may not dictate to a state how it will manage internal growth by use of available increments).

revisions are enforceable by the states when adopted.[17] However, SIP revisions are federally enforceable when approved by EPA.[18] During the EPA review period, companies face two different legal requirements, namely the SIP revision under state law and the previous SIP under federal law.[19] That is why Congress placed a premium on prompt EPA review and required final EPA action in four months.

Once one recognizes the important state interests that are affected by EPA's failure to complete its review of a SIP revision in a timely manner, it becomes apparent that one cannot, as the First Circuit suggests, properly deal with the problem through "less drastic" remedies. The district court's decision below persuasively summarized the reasons why barring enforcement under these circumstances is necessary. Noting that EPA would suffer little prejudice from such a rule (since it could remove the bar prospectively at any time simply by acting on the revision), the district court found that failure to apply the bar would substantially prejudice the interests of both the states and affected third parties:

> "[A] period of greater than four months would leave both the states and the affected industries in an unjustifiable state of limbo. For an indefinite period, the state would be unable to act to balance dictated national priorities with the interests of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would in some instances face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later." (General Motors Suppl. Appx. at SA 6-7).

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[17] *See* 42 U.S.C. § 7410(a)(2)(B), (D).

[18] *See* 42 U.S.C. § 7410(d).

[19] *See* Sierra Club v. Indiana-Kentucky Electric Corp., 716 F.2d 1145, 1151 (7th Cir. 1983).

The fundamental problem with the approach adopted by the court below is that it provides little or no incentive to EPA to abandon its stubborn determination to ignore its obligation to review SIP revisions on an expedited basis. The decision below will allow such SIP provisions to be subject to conflicting state and federal enforcement, contrary to the intent of Congress and the Fifth Circuit's decision in the *American Cyanamid* case. The conflict in the circuits leaves industrial facilities subject to revised SIP requirements, which are not acted on by EPA in a timely manner, in legal limbo with no clear guidance as to their legal status. A resolution of this conflict by this Court is therefore of critical importance.

CONCLUSION

For the foregoing reasons, General Motors' petition for a writ of *certiorari* should be granted.

Respectfully submitted,

ROBIN S. CONRAD
Counsel of Record
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Amicus Curiae Chamber of Commerce of the United States of America

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